

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES DEMONTE)	
Claimant)	
)	
VS.)	
)	
ARCH ALUMINUM & GLASS)	
Respondent)	Docket No. 250,902
)	
AND)	
)	
HARTFORD ACCIDENT & INDEMNITY)	
Insurance Carrier)	

ORDER

Both parties appealed Administrative Law Judge Robert H. Foerschler's Award dated May 21, 2002. The Board heard oral argument on December 11, 2002.

APPEARANCES

Davy C. Walker of Kansas City, Kansas, appeared for the claimant. Heather Nye of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that the medical exhibits introduced at the preliminary hearing could be considered as part of the record without further supporting testimony.

ISSUES

The Administrative Law Judge (ALJ) determined a stroke claimant suffered approximately October 26, 1999 was not caused by a work-related motor vehicle accident claimant had on October 8, 1999. The ALJ denied an award of compensation but assessed the medical expenses incurred by claimant for testing and diagnosis of his thrombotic cerebrovascular accident against the respondent.

The following issues were raised on review by the claimant: (1) whether the claimant's stroke arose out of and in the course of employment pursuant to K.S.A. 44-501(e); (2) nature and extent of claimant's disability, if any; and, (3) whether the claimant is entitled to unauthorized and future medical.

The respondent argues Dr. Fernando Egea's deposition was taken outside of the terminal dates established for submission of evidence and accordingly should not be considered as part of the record. The respondent further argues the ALJ erred in ordering the payment of medical bills for a non work-related medical condition.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant was employed as a truck driver for respondent. A typical workday consisted of taking a loaded trailer from Kansas City to St. Louis and then returning with a different tractor and trailer. On October 8, 1999, claimant was returning to Kansas City when his truck skidded, spun around and left the roadway. During the incident claimant noted his head bounced off the top of the truck's cab.

The claimant did not seek any medical treatment as a result of the accident. Claimant called the shop, another tractor was brought to the scene of the accident and claimant hitched the trailer to that vehicle and drove it back to Kansas City. Claimant advised his supervisor that he was shaken up and just had a headache. Claimant continued to work and perform his usual job duties.

On October 26, 1999, claimant described getting a headache, becoming nauseous and throwing up. While throwing up claimant noted that he felt as if something tore in his head. Claimant further felt as if his left hand and leg were swelling and he couldn't use his left leg. He then advised his wife he needed to go to the hospital and he was taken to the KU Medical Center emergency room. A CT scan was negative but a follow-up CT scan was recommended. Claimant was prescribed medication and returned home. On October 28, 1999, the follow-up CT scan was again negative for any evidence of acute intracranial abnormality.

Because the claimant continued to experience difficulty walking, using his left hand and numbness on his left side, he returned to KU Medical Center on November 2, 1999. A CT scan performed on November 3, 1999, demonstrated evidence of a right middle cerebral artery infarct. A subsequent arteriogram confirmed occlusion of the superior

division of the right middle cerebral artery. Claimant received treatment for the diagnosed thrombotic stroke.

The respondent referred claimant to Dr. Vito Carabetta for an analysis of whether the cardiovascular accident the claimant suffered was related to the motor vehicle accident. The claimant gave Dr. Carabetta a history of suffering the motor vehicle accident on October 22, 1999, rather than the actual date of accident of October 8, 1999. In his initial report, dated December 22, 1999, Dr. Carabetta concluded there was no causal relationship between the motor vehicle incident and the later cerebral vascular accident. The doctor noted that after the motor vehicle incident the claimant did not suffer paralysis which later developed and was caused by the cerebral vascular accident.

When deposed, the doctor noted, based upon the medical evidence, that claimant had not suffered any brain injury as a result of his head hitting the top of the cab. Moreover, when advised the motor vehicle accident actually occurred on October 8, 1999, and the claimant had continued performing his truck driving duties, the doctor noted that confirmed the lack of brain injury in the motor vehicle accident as well as the fact there was no connection between the motor vehicle accident and the stroke the claimant suffered sometime after October 26, 1999.

Respondent also referred claimant to Dr. Donald Hopewell for analysis of whether the motor vehicle accident caused the claimant's stroke. The claimant provided the doctor a history of suffering the motor vehicle accident on October 22, 1999, rather than the actual date of October 8, 1999. In his initial report dated January 18, 2000, the doctor concluded there might be a connection between the motor vehicle accident and the claimant's stroke. However, when advised claimant's motor vehicle accident had occurred on October 8, 1999, the doctor concluded the interval of time between the motor vehicle accident and the claimant's stroke was too long for the motor vehicle accident to have caused the stroke.

Dr. Christopher Milford, one of claimant's treating physicians at KU Medical Center, responded to a letter of inquiry from the respondent and noted it was difficult to determine if there was a relationship between claimant's motor vehicle accident and his stroke. The doctor noted the onset of the left sided weakness can be consistent with a carotid dissection which can occur after accidents and insidiously develop. However, the doctor noted claimant did not have a carotid dissection.

Dr. John A. Holmes was ordered by the ALJ to provide an independent medical examination of the claimant. The claimant provided Dr. Holmes with a history of suffering the motor vehicle accident on October 22, 1999, rather than the actual date of October 8, 1999. Initially, Dr. Holmes, opined there was a causal relationship between the motor vehicle accident and claimant's stroke because of the temporal relationship between the events. When apprised of the actual date of accident and the fact claimant continued

driving trucks for approximately two weeks after the accident, the doctor concluded the stroke was not related to the motor vehicle accident.

The claimant's attorney referred him to Dr. Egea for evaluation. Dr. Egea concluded claimant had suffered a slowly progressive occlusive, thrombotic stroke as a result of head injuries sustained in the motor vehicle accident. The doctor relied upon a history of onset headaches, dizziness and vomiting within a few days of the motor vehicle accident. The doctor agreed that if the onset of symptoms did not occur until approximately 18 days after the accident, then he would have some reservations whether there was a connection between the accident and the stroke.

The workers compensation act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.¹ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."²

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.³

The facts establish that after the motor vehicle accident the claimant continued to work without complaint for over two weeks. Although his companion testified claimant complained of headaches after the motor vehicle accident, when asked about the onset of severe symptoms, the claimant responded:

Q. That's fine. Really what I am looking for is the date you started to have severe symptoms is the same day you went to the doctor; is that right?

A. When I was throwing up, yes. It was just getting worse, yes.⁴

Drs. Carabetta, Hopewell, Milford and Holmes all concluded there was no causal connection between claimant's motor vehicle accident and his cerebrovascular accident. Although Dr. Egea disagreed he relied upon an onset of dizziness and vomiting within days

¹ K.S.A. 44-501(a).

² K.S.A. 44-508(g).

³ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

⁴ P.H. Trans. at 34 (Mar. 2, 2000).

of the accident which claimant did not experience until the day of his hospitalization approximately 18 days after the accident. The Board agrees with and affirms the ALJ's decision claimant failed to meet his burden of proof that the stroke he suffered was caused by the motor vehicle accident.

It is the duty of the employer to provide the services of a health care provider and medical treatment as may be reasonably necessary to cure and relieve the employee from the effects of the injury.⁵ The employee, without approval of the employer, may consult with a health care provider for examination, diagnosis or treatment, but the employer is only liable for fees of \$500, under such circumstance.⁶

The ALJ correctly noted respondent was liable for the expense of the proceedings and the court ordered independent medical examination. Moreover, because claimant did suffer a work-related motor vehicle accident, respondent would be liable for \$500 in unauthorized medical. However, because the cerebrovascular accident was not work-related, the respondent is not otherwise liable for the medical expenses incurred in the diagnostic testing and treatment claimant received for that condition.

The respondent argued that Dr. Egea's deposition testimony should not be considered because it was taken outside of the established terminal dates. It appears the claimant's office staff contacted the respondent's staff to find an agreeable date to conduct the deposition and staff agreed to a time outside the terminal dates even though several days were offered within claimant's established terminal date. Respondent was unavailable for any days within claimant's terminal dates. After hearing the explanation for the delay in getting the request for extension of the terminal dates filed, the ALJ determined there was good cause to extend the terminal dates to include the deposition of Dr. Egea. The Board agrees.

AWARD

WHEREFORE, the Award of Administrative Law Judge Robert H. Foerschler dated May 21, 2002, is modified to reflect respondent is not liable for the medical expenses related to the diagnostic testing and treatment claimant received for his cerebrovascular accident. The Award is affirmed in all other respects.

IT IS SO ORDERED.

⁵ K.S.A. 44-510h(a).

⁶ K.S.A. 44-510h(b)(2).

Dated this _____ day of February 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Davy C. Walker, Attorney for Claimant
 Heather Nye, Attorney for Respondent
 Robert H. Foerschler, Administrative Law Judge
 Director, Division of Workers Compensation